No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF TACOMA, PETITIONER

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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OPINIONS BELOW

The original opinion of the Washington Supreme Court and that on rehearing (Pet. App. A 1a–48a) are reported at 49 Wn. 2d 781.

JURISDICTION

The judgment of the Washington Supreme Court was entered on April 30, 1957 (Pet. App. E. 126a). A petition for rehearing was denied on April 30, 1957 (Pet. App. F 131a). By order of Mr. Justice Black dated July 22, 1957 (Pet. App. G 132a), the time for filing a petition for a writ of certiorari was extended to and including September 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

The Federal Power Commission issued to the City of Tacoma, a municipal corporation in the State of Washington, a license under the Federal Power Act for the construction and operation of a hydroelectric development on the Cowlitz River. In order to construct the project thus authorized, Tacoma will have to condemn a fish hatchery owned and operated by the State of Washington for public purposes. The main question presented is:

Whether Section 21 of the Federal Power Act, authorizing licensees under the Act to condemn property necessary for the project, vests the requisite power in Tacoma to condemn the fish hatchery notwithstanding Tacoma's asserted lack of power and capacity under state law to condemn such property.

STATUTE INVOLVED

Section 21 of the Federal Power Act, 41 Stat. 1063, 1074, 16 U. S. C. 814, provides in pertinent part:

> * * * When any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court

of the United States for the district in which such land or other property may be located, or in the State courts. * * *

STATEMENT

The relevant facts may be summarized as follows:

Prior proceedings.—In 1951, the Federal Power Commission granted a license under the Federal Power Act to the City of Tacoma, a municipal corporation in the State of Washington, authorizing it to construct and operate a hydroelectric project on the Cowlitz River, a tributary of the Columbia River in Washington. The proposed project was to comprise two developments: (1) the Mossyrock development, about 65 miles up the Cowlitz, was to consist of a dam, about 510 feet high, which would create a reservoir extending about 21 miles upstream with a usable storage capacity of 824,000 acre-feet of water, and a power house with an initial installation of three units, each having 75,000 kilowatts of capacity, and provision for a fourth unit of the same capacity; (2) the Mayfield development, about 52 miles from the Cowlitz mouth, was to consist of a dam, about 240 feet high, which would create a reservoir 13½ miles long extending up to the Mossyrock dam, with a usable storage capacity of 21,000 acre-feet and a powerhouse with an initial installation of three units, each with a 40,000 kilowatt capacity, and provision for an additional unit of the same capacity. In the initial installation, the dependable capacity would be about 275,000 kilowatts, with an average annual output of 1,400 million kilowatt hours.

In granting the license, the Commission found that, in addition to providing substantial flood control, navigation, and recreational benefits, the project would assist greatly in alleviating the severe power shortage in the Northwest Region—a matter of national concern—and that none of the projects suggested for construction in lieu of the Cowlitz Project could be constructed as quickly or economically. Thus, the Commission found that the project would be an exceptionally valuable addition to the Northwest power supply because of its size (it will add 190 per cent to the present capacity of Tacoma's generating plants and nearly ten per cent to the combined total installation in the Pacific Northwest power pool); location (it is to be on the west side of the Cascade Mountains where the power shortage is most acute and near the densely populated areas of Tacoma, Seattle, and Portland); and the characteristics of its power output (the diversity of stream flow, due to the Cowlitz's flow being high when the Columbia flow is low, will make large blocks of power available at the regional peak demand, thereby increasing the flexibility of the Northwest power pool), 10 F. P. C. 424–445; 92 P. U. R. (N. S.) 79 *ff*, Pet. App. C 81a *ff*.[1]

[1] The Commission went to exceptional lengths to make sure that the fisheries resources of the Cowlitz would be protected to the fullest extent possible, requiring an initial investment of $9,400,000 and annual expenditures of around $610,000 for this purpose, together with close cooperation between the City of Tacoma and the State and Federal fishery agencies. In addition, the Commission, as special conditions of the license, required that additional studies, test and experiments as to the various fish protective devices be made in cooperation with the United States Fish and Wildlife Service and the Departments

The Washington Department of Game and Fisheries had opposed the granting of the license before the Commission and, when the Commission granted the license, the Department sought review in the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed, ruling that the Commission's findings as to the necessity of the project to alleviate the power shortage, and the effectiveness of the proposed facilities to protect the fish in the Cowlitz River, as well as the finding that the Cowlitz Project was best adapted to a comprehensive plan for developing the river, were supported by substantial evidence and therefore conclusive. *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391 (Pet. App. D 112a–124a). Answering the Game and Fisheries Department's argument that Tacoma, as a creature of Washington, "cannot act in opposition to the policy of the State or in derogation of its laws" (see 207 F. 2d at 396), the Ninth Circuit commented (*ibid.*; Pet. App. D 120a):

> Again, we turn to the First Iowa case [*First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152]. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared

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of Fisheries and Game of the State of Washington prior to permanent construction of such facilities; that the studies and investigation with respect to the program of stream improvement and hatchery facilities be continued; and that only those facilities as may be prescribed thereafter by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior be constructed.

policy of its creator, and to prevail in obtaining a license.[2]

This Court denied certiorari. 347 U. S. 936.

While the Ninth Circuit proceeding was still pending, Tacoma sought in the state courts a declaratory judgment as to validity of the proposed issue of bonds up to $146,000,000 to finance the construction of the project. Opposing, the Department of Game and Fisheries urged *inter alia* that the City "being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that [the City] ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949)." In rejecting this argument in a divided decision, 43 Wn. 2d 468, the Washington Supreme Court, after analyzing the pertinent materials, concluded (43 Wn. 2d at 492; Pet. App. B 74a–75a):

> The Federal power act defines the term municipal corporation and authorizes the

[2] The Ninth Circuit continued (*id.* at 396–397; Pet. App. D 121a):

> Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream since the stream is under the dominion of the United States. However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them.

> power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act. * * *

Accordingly, since the case was before it on the granting of a demurrer to Tacoma's complaint, the cause was remanded for further proceedings.

Present proceedings.—In the course of the complicated proceedings following the remand, the Director of Game and Fisheries moved in the trial court on June 24, 1955, for a temporary restraining order and injunction *pendente lite,* to enjoin Tacoma from continuing the development and construction of the project as it had undertaken to do (R. 111–112; see Pet. App. A 3a–5a). Thereafter, the State of Washington, in its sovereign capacity, was added as a party defendant on the Director's motion, and for the first time the defendants raised the issue as to Tacoma's power, as a municipality of the State of Washington, to condemn the state-owned Mossyrock fish hatchery and the adjoining land, operated by the Game and Fisheries Department and located within the Mayfifield reservoir site (see Pet. App. A 6a). Tacoma's reply denied that it lacked the requisite power to condemn these properties under the "laws of the United States" (R. 262, 203–204,

239).[3] The trial court ruled that it lacked jurisdiction to pass on Tacoma's eminent domain authority; however, it held that Tacoma was acting illegally in constructing the project since it would interfere with public navigation contrary to state law; consequently, the court enjoined Tacoma from spending any more money on the project (see Pet. App. A 9a). Both sides appealed.

In another divided decision, a new majority of the Washington Supreme Court, after holding, among other things, that, despite the absence of a condemnation proceeding, the question of Tacoma's power to condemn the fish hatchery was properly before it (Pet. App. A 11a), ruled that Tacoma did not have power to condemn such land owned and used by the state for public purposes. In so holding, the Washington court reasoned as follows: "A municipal corporation does not have an inherent power of eminent domain. It may exercise such power only when it is expressly authorized to do so by the *state legislature*" (italics in original; Pet. App. A 15a). Statutes making such a delegation to a municipality are to be strictly construed (Pet. App. A 16a). There are several prior decisions to the effect that references in railroad condemnation statutes to lands granted to the state do not include state lands segregated from the public domain and appropriated to a public use (Pet. App. A 17a). Accordingly, the state statutes au-

[3] Tacoma had repeatedly offered to buy the hatchery and relocate it with greatly improved facilities at a level above the reservoir, but the State, after finding administratively that the hatchery was "irreplaceable," had rejected the offers.

thorizing municipal corporations to operate public utilities and to condemn property in connection therewith do not authorize Tacoma to condemn state-owned property previously dedicated to a public use (Pet. App. A 17a–18a). The court concluded that "the city of Tacoma has not been endowed with the statutory capacity to condemn such lands" (Pet. App. A 18a) and "[*i*]*ts inability so to act can be remedied only by state legislation that expands its capacity*" (italics in original; Pet. App. A 19a).

As to the effect to be given to the license issued by the Federal Power Commission, the court was of the view (Pet. App. A 20a):

> * * * the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*: it presents a question of *lack* of *state statutory power* in the city. It does not present a Federal question: it presents a question peculiarly within the jurisdiction of the state of Washington.
>
> The Federal government may not confer corporate capacity upon local units of government beyond the capacity given them by their creator, and the Federal power act, as we read it, does not purport to do so. [Italics in original.]

And since the question was not "of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right" (Pet. App. A 18a), the court regarded its ruling as not inconsistent with either the earlier Ninth Circuit decision or this Court's decision in *First Iowa Coop.*

v. *Federal Power Commission*, 328 U. S. 152 (Pet. App. A 19a).

On those grounds, the court affirmed the injunction against Tacoma's construction of both dams (Pet. App. A 21a).

REASONS FOR GRANTING THE WRIT

1. The ruling by the Washington Supreme Court—that, despite the Federal Power Commission's grant of a license to Tacoma and the authorization contained in Section 21 of the Federal Power Act, the city could not condemn the state-owned Mossyrock fish hatchery since, as a creature of the state, its capacity and power to condemn under state law did not extend to state-owned property dedicated to a public use—raises an important and general problem in the development of the nation's water-power resources and the administration of the Federal Power Act. For, as the Washington Supreme Court recognized on rehearing (Pet. App. A 21a), the result of its ruling would be to prevent the construction of a project which the Commission found, in granting a license to Tacoma, would most expeditiously and economically assist in alleviating the acute power shortage not only in Washington but in the entire Pacific Northwest area. Moreover, since the power to acquire property by eminent domain is of critical importance to the construction of hydroelectric projects, the court's ruling will open to the states an easy avenue for asserting a veto power over the Commission's grant of licenses to municipal and public corporations, in the teeth of the preference which Section 7 (a) of the Power Act requires the Commission to

give to applications for licenses by states and municipalities. As a result, that preference clause would lose much of its effectiveness, for the Commission, confronted with the potential inability of municipal corporations otherwise authorized under state law to proceed under a license, would often have little choice but to grant the license to private power companies which presumably would not be subject to the special rule espoused by the Washington court for municipalities.

2. (*a*). Having held that, under state law, Tacoma lacked power and capacity to condemn state-owned property dedicated to a public use, the Washington court appeared to conclude that the license granted by the Commission, together with Section 21 of the Power Act, was insufficient to enable Tacoma to condemn the property.[1] This ruling is, in our view, an erroneous reading of federal law.

Assuming that the court properly held that, as a state matter, Tacoma lacked such condemnation power, it nevertheless seems clear that a grant by the Federal government to a state-created instrumentality, for the purpose of enabling it to carry out federally-authorized functions, is effective to bestow the requisite power. As this Court said in *Seaboard Air Line Railroad Co.* v. *Daniel*, 333 U. S. 118, with regard to the

[1] The opinion below does not make it clear whether the Washington court was holding that Section 21 could not effectively confer *power* to condemn upon Tacoma unless Tacoma also had such power from the state, or whether it was holding that, although Section 21 conferred the power, Tacoma lacked the requisite *capacity* under state law to exercise the granted power. The latter alternative is discussed *infra*, pp. 19-23.

last sentence of Section 5 (11) of the Interstate Commerce Act[5] (333 U. S. at 126–127):

> * * * Although the sentence bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California* v. *Central Pacific R. Co.*, 127 U. S. 1, 38, 40–5. Here, just as a federally created railroad corporation could for federal purposes operate in South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State.

This general principle is particularly applicable where the Federal Government undertakes to grant the power of condemnation to a state-created instrumentality in connection with its performance of a federally-authorized function. Thus, in *Lafayette* v. *City of St. Louis*, 201 Fed. 676 (C. A. 7), the question related to the power of the City of St. Louis, a Missouri municipal corporation, to condemn land in Illinois for the purpose of building a bridge across the Mississippi River pursuant to a federal statute. Rejecting the argument that the City could not condemn

[5] The last sentence in Section 5 (11) provides: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Illinois property because Illinois had not given it the requisite power, the Seventh Circuit, after pointing out that the construction of the bridge and of its necessary approaches were matters of national concern, ruled (201 Fed. at 678–679):

> * * * that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. * * * Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. *In reason the material thing is the principal's authority, not the parentage or birthplace of the agent.* * * * [Emphasis added.]

Also very close to the present situation is *State of Missouri v. Union Electric Light & Power Co.*, 42 F. 2d 692 (C. D. Mo.), where the state sought to enjoin a licensee under the Federal Power Act from constructing the authorized project because it would inundate many public highways, schools districts, and a county courthouse. In considering whether the eminent domain power delegated by Section 21 of the Act embraced property already dedicated to a public use, the court commented (42 F. 2d at 698):

> * * * the proposed improvements could not be accomplished, except through the exercise, if

> necessary, of eminent domain against property already dedicated to public use. To deny the right of eminent domain as against this public property would not only defeat the functions of the national government, but would run contrary to the obvious intent of the Congress as expressed in the Water Power Act. * * *

And in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9 (D. N. J.), where the Attorney General of New Jersey sought to enjoin the construction by the railway, a New York corporation, of a railway bridge authorized by a federal statute from New Jersey to Staten Island, New York, Justice Bradley, in a classic opinion written while on circuit, affirmed "the capacity and right" of the railway to construct the bridge in New Jersey, ruling (32 Fed. at 14–15):

> At all events, if congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the state, or out of the state, we see no reason why it should not do so. There is nothing in the constitution to prevent it from making contracts with or conferring powers upon, state corporations, for carrying out its own legitimate purposes. What right of the state would be invaded? The corporation thus employed, or empowered, in executing the will of congress, could do nothing which the state could rightfully oppose or object to. It may be added that no state corporation more suitable than the defendant could be empowered to build the bridge in question in this case, since one-half of the bridge is in the state of New York, and

the railroad of the defendant is to connect with it on the New York side.[8]

While the condemnation of state property dedicated to public use involved in the *Union Electric* and *Stockton* cases was by a state-chartered private corporation acting under federal authorization, there is no reason why the same principle should not be equally applicable where the condemnation is by a municipal corporation similarly acting under such an authorization.

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[8] Justice Bradley continued (*id.* at 15):

> In our judgment, if congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. The objection that congress cannot confer powers on a state corporation is untenable. It has used their agency for carrying on its own purposes from an early period. It adopted as post-roads the turnpikes belonging to the various turnpike corporations of the country, as far back as such corporations were known, and subjected them to burdens, and accorded to them privileges, arising out of that relation. It continued the same system with regard to canals and railroads when these modes of transportation came into existence. Nearly half a century ago, it constituted every railroad built, or to be built, in the United States, a post-road. This, of course, involved duties, and conferred privileges and powers, not contained in their original charter. In 1866, congress authorized every steam railroad company in the United States to carry passengers and goods on their way from one state to another, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. The powers thus conferred were independent of the powers conferred by the charter of any railroad company. Surely these acts of congress cannot be condemned as unconstitutional exertions of power.

For, as stated in *Latinette, supra,* "In reason the material thing is the principal's authority [*i. e.* the Federal Government], not the parentage or birthplace of the agent." See, also, *City of Davenport* v. *Three-Fifths of an Acre of Land,* 147 F. Supp. 794 (S. D. Ill.). And as the court below recognized in its earlier opinion, "[h]aving been granted a license by the power commission, * * * [Tacoma] is at the present time in the same position as any other licensee under the Act" (Pet. App. 74a–75a).

(*b*). Once it is recognized that the Federal Government may validly vest power in a state-created instrumentality, private or municipal, beyond that given it by the state in order to enable it to carry out federally-authorized functions, it becomes clear that Tacoma as a licensee has been given the requisite condemnation power by Section 21 of the Power Act.

It is settled, in the first place, that under the supremacy clause of the Constitution the federal government's power of eminent domain extends to such state-owned property. See, *e. g., Oklahoma* v. *Guy F. Atkinson Co.,* 313 U. S. 508; *United States* v. *Gettysburg Elec. R. Co.,* 160 U. S. 668; cf. *Kohl* v. *United States,* 91 U. S. 367. This has been recently reaffirmed in *United States* v. *Carmack,* 329 U. S. 230, where the Federal Government undertook to condemn, for a post office, state property including a county court house and a city hall (329 U. S. at 236):

> The power of eminent domain is essential to a sovereign government. If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land,

> by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will. * * * .

In the Federal Power Act, Congress has undertaken to exercise its authority over interstate commerce including navigable waters. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152. And, in that Act, it has authorized licensees to exercise the power of eminent domain for the construction and operation of the project for which the license has been granted. Section 21 of the Act, *supra*, pp. 2–3, provides:

> * * * When any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * *[7]

[7] "Licensee" as so used includes a municipality such as Tacoma: Section 3 (5) of the Act defines "licensee" as meaning "any person, State, or municipality licensed under the provisions of section 4 of this Act," and Section 3 (7) defines "municipality"

These "federal powers of condemnation vested in licensee[s]" (*First Iowa, supra,* at p. 181, fn. 25) as part of "the federal plan of regulation" (*id.* at p. 181) are ample to vest the requisite power in Tacoma to condemn the fish hatchery. See *State of Missouri* v. *Union Electric Light and Power Co.,* 42 F. 2d 692 (C. D. Mo.). See, also, *United States* v. *Carmack,* 329 U. S. 230; *City of Davenport* v. *Three-Fifths of an Acre of Land,* 147 F. Supp. 794, 799–800 (S. D. Ill.) (where the condemnation statutes were formulated, as here, in general terms, yet held to extend to state-owned property previously dedicated to public use).[8]

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as "a city, county, irrigation district, drainage district; or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." Tacoma fully satisfies this requirement for, under the Washington law, all classes of municipal corporations have been authorized to operate electric utility systems, including hydroelectric projects. *Hutton* v. *Martin,* 41 Wn. 2d 780; *Tacoma* v. *Nisqually Power Co.,* 57 Wash. 420; see also, Pet. App. B 74a–75a and *supra,* pp. 3–7. As a matter of fact, where a subdivision of a state has been granted a license and has invoked Section 21 to condemn private lands, the propriety of such exercise of eminent domain has generally been accepted without question. See, *e. g., Central Nebraska Public Power & Irrigation District* v. *Harrison,* 127 F. 2d 588 (C. A. 8).

[8] In the court below, respondents relied heavily upon *Federal Power Commission* v. *Niagara Mohawk Power Corp.,* 347 U. S. 239, for the proposition that, whatever its constitutional authority, Congress in the Federal Power Act did not affirmatively grant any rights, but merely gave a "green light" for the exercise of authority already created by another source. But in *Niagara Mohawk,* this Court held only that Congress in Section 27 of the Power Act had not abolished usufructuary rights to water otherwise valid as private property rights under state law. There is nothing in *Niagara Mohawk* in any way bearing on the scope and impact of Section 21.

Should the comparative importance of the old and the new public uses be a factor in determining the propriety of exercising federal eminent domain power to condemn state-owned property already dedicated to public use (see *United States* v. *Carmack*, 151 F. 2d 881 (C. A. 8), reversed, 329 U. S. 230; cf. *City of Norton* v. *Lowden*, 84 F. 2d 663, 665–666 (C. A. 10)), it should be noted that if Tacoma cannot obtain the lands on which the fish hatchery is located and which are needed for its project, it will be unable to construct the project licensed by the Commission—a project which, as already noted, the Commission found would go a long way toward alleviating the acute power shortage in the Pacific Northwest, including but not limited to Washington. See *supra*, p. 4. On the other hand, if Tacoma can condemn the lands on which the fish hatchery is now located, the hatchery can, at a relatively small cost, be relocated within a short distance of its present site (see *supra*, pp. 4, 8.) If a comparison of the relative importance of the two public uses is appropriate, the balance would clearly swing in favor of condemnation for the federal project.

3. If the Washington court meant to distinguish between "capacity" and "power" and, on that basis, to rule that as a matter of state law Tacoma lacked "capacity" to condemn the fish hatchery and therefore could not exercise the federally-conferred authority (see footnote 4, *supra*, p. 11), that holding would be contrary to the principles of federal supremacy. As we show *infra*, pp. 20–23, Washington municipalities have general "capacity" to receive

grants of condemnation power from the state, and therefore there can be no discrimination in this regard against the Federal Government. *Testa* v. *Katt*, 330 U. S. 386, 394.

In addition, such a holding as to "capacity" would appear to be without substantial support in Washington law. In connection with its electric utility business, including its operation of hydroelectric projects, Tacoma undoubtedly has the general capacity to accept grants of authority to condemn needed land, *including state-owned lands*. See Revised Code of Washington 80.40.050, 8.12.030, 80.40.010; *Tacoma* v. *State*, 121 Wash. 448; *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420; Pet. App. B 73a–74a. Far from distinguishing between capacity and power, the prior Washington decisions, including those cited by the court below, assume the existence of capacity once power or authority has been granted. Thus, not only do the court's quotations from Lewis on *Eminent Domain* and 91 L. Ed. 259 (see Pet. App. A 16a) both deal with the power, not the capacity, of state agencies to condemn state-owned property previously dedicated to public use, but *State* v. *Superior Court*, 91 Wash. 454, and *Seattle & Montana Ry. Co.* v. *State*, 7 Wash. 150 (Pet. App. A 17a), similarly are phrased in terms of power, and not capacity.[9] Both of these cases concerned the authority of railroads to condemn (under state statutes) property al-

[9] In *State* v. *Superior Court*, *supra*, the Washington court stated (at 461): "In the case before us, the question is solely one of power. The question is whether the state has granted to railway companies the right to condemn land which it has reserved and set apart for a public use."

ready dedicated to public use and they merely held that the statutes did not confer power to condemn such property, rulings which plainly are not denials of capacity once authority is shown to have been granted by the State or Federal Government.

Particularly pertinent is *Tacoma* v. *State*, 121 Wash. 448, which the court below cited in its opinion on the prior appeal (see Pet. App. B 74a). In that case, Tacoma sought to condemn certain lands and interests in connection with its construction of another hydroelectric plant. Among the property interests Tacoma wished to condemn were (1) a so-called "eyeing station" which the state owned and claimed that it intended to use as a fish hatchery, (2) some of the waters passing a state-owned fish hatchery then in use, (3) a portion of the lands within a school section owned by the state, and (4) waters presently used by fish for propagation. In upholding the condemnation by the city of all these property interests, the Washington court expressed no concern over Tacoma's capacity to condemn but rather regarded as critical the relative public benefits which would result from the allegedly competing public uses. Thus, as to the "eyeing station," the court commented (121 Wash. at 452):

> The mere fact that the state owns the property and has the right and power to devote it to a public use is not sufficient to prevent the city from diverting the water therefrom, under the broad powers conferred upon cities by our statute, Rem. Compiled Statutes, § 9488, or, in any event, the unfulfilled purpose of the state, indefinite as to time and conditions, must, under

> § 4, ch. 117, p. 448, Laws of 1917 (Rem. Comp. Stat., § 7354), give way to the immediate and definite use proposed by the city.

Similarly, as to the diversion of water past the fish hatchery, the court noted (121 Wash. at 453):

> * * * It may be, as contended by the state, that from the fact that condemnation is sought will flow the presumption of damage to the owner, but if so, it may be only because water is taken which is not used or necessary to be used in carrying out the public purpose to which the property is devoted. However that may be, the evidence disclosed by the record is sufficient to overcome any presumptions, and preponderates to the effect that, after the proposed diversion, there will be ample water in the main stream for the use of the hatchery, and that the diversion will even be a benefit to the hatchery, in that it will reduce the flow in times of high water, which now causes damage. * * *

And, in the same vein, the court held as to the waters used for fish propagation (*id.* at 453–454):

> The contention that the diversion of the waters will destroy or seriously damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence. But even if it were, we would be reluctant to hold that the fish, by following their natural instincts, had devoted the stream to such a public purpose as would defeat the city's rights under the statutes hereinbefore cited.

It would thus appear that the prior Washington decisions, construing condemnation statutes as not including state-owned property already dedicated to

public use, were grounded not on the lack of capacity in the condemning agency but rather on the absence of power or authority to condemn. A ruling distinguishing between capacity and authority and holding Tacoma without capacity as a matter of state law, even though adequate power were granted by the Federal Government, would thus be without substantial basis.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari filed by the City of Tacoma in this case should be granted.

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